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In the

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-968

JOE T. BARRERA,

Petitioner,

v.

ROSCOE, SNYDER AND PACIFIC RAILWAY COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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March 4, 1975.

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To the Supreme Court of the United States:

OPINIONS BELOW

The opinion of the Fifth Circuit is reported at *503 F.2d 1058*, and the opinion of the district court at *385 F. Supp. 455*.

QUESTION PRESENTED

Petitioner, plaintiff in the trial court, here continues an effort, rejected both by the United States District Court for the Northern District of Texas and by the Fifth Circuit, to constitute himself an employee of respondent railroad, thus making him eligible to recover damages against respondent, for an on the job injury, under the Federal Employers' Liability Act, *45 U.S.C.* §*51, et seq.*

Petitioner concedes that he is an employee of a non-railroad corporation (which, contrary to the statement at p. 3 of the petition for certiorari, is not a "wholly owned subsidiary," or even a subsidiary, of respondent), and that he was working solely for his employer on the occasion of his accident. His theory for obtaining FELA coverage is to contend that his employer is a sham, paper corporation, dominated by respondent and established by respondent to avoid liability under the FELA, and that, accordingly, the employer's corporate entity may be disregarded and petitioner considered an employee of respondent. The jury found (1) that petitioner's employer was an "alter ego" of respondent but (2) that it was not established to avoid FELA liability; on respondent's motion, the district court rendered judgment, notwithstanding the "alter ego" finding, that petitioner take nothing from respondent.

After hearing oral argument, the Fifth Circuit affirmed; the per curiam opinion of the panel (Circuit Judges Rives, Gewin, and Goldberg) reads in full as follows:

> "We have given careful consideration to the contentions of the parties as set forth in their well-prepared briefs and further amplified at oral argument. It is our opinion that the district court arrived at the proper conclusion and that the appellant has not presented any valid basis for reversal. Accordingly, the judgment entered for appellee by the district court is affirmed." (*503 F.2d 1058*, copied at petition for certiorari 19.)

The question presented to this Court is whether it will grant certiorari to review the Fifth Circuit's decision when (1) petitioner could point to no evidence in the Fifth Circuit, and points to none here, which could cast any doubt whatever upon the

district court's holding, dispositive of the case, that as a matter of law petitioner's employer was not an alter ego of respondent; and (2) the jury's finding that the employer was not established to avoid FELA liability is fully supported by the evidence, was not attacked by the petitioner in the Fifth Circuit, and is not attacked here, and, therefore, conclusively establishes against petitioner an essential element of petitioner's case; and (3) the evidentiary ruling complained of by petitioner was correct and, in any event, could not have affected the outcome of the case.

STATEMENT OF THE CASE

At all times material to this case, petitioner's employer, RSP Railway Equipment Corporation (called in the record and herein the "Equipment Corporation") was a duly organized Texas corporation located in Roscoe, Texas, and engaged in the business of repairing and manufacturing railway equipment. The railroad which was defendant below, respondent here, is Roscoe, Snyder and Pacific Railway Company, whose principal place of business is in Snyder, Texas. Although the petition for certiorari essentially asks this Court to substitute its view of the evidence for that of the district court and the Fifth Circuit, and hold that the corporate entity of the Equipment Corporation is simply a device to enable respondent to evade the FELA, petitioner does not give this Court an adequate summary of the material facts or the proceedings below. Accordingly, the following brief statement is submitted.

Respondent was chartered in 1906; extending some 31 miles between the West Texas towns of Snyder and Roscoe, the railroad serves as a connecting line between two large railroads, the Texas Pacific and the Gulf, Colorado & Santa Fe. (Def. Ex. 1; R. 256,

396.) Respondent had always had a repair shop for its own equipment, and in the early 1960's, when a number of other railroads in the area closed their shops, respondent's shop began to do more and more repair work on railroad equipment for other companies. In fact, this business prospered to the extent that, by 1966, 43.24% of respondent's gross sales came from its shop operations, only about 3% of which was for work done on respondent's own equipment. (R. 349, 501, 505.)

This very magnitude, however, made it difficult for respondent to continue operating such a business. In the first place, it was necessary to borrow considerable amounts of money for shop operations, and, under Interstate Commerce Commission regulations, respondent could not borrow in excess of $20,000.00 — far less than the repair business needed. (R. 352, 356, 494.)* Another problem was that railroads are limited by American Associations of Railroads policy to charging break-even prices for car repair, and respondent's officers thought a car repair business of this size ought to be able to make a profit. (R. 495, 514.) Still another difficulty was that ICC regulations would not permit respondent to set up a separate account for repair shop income, so there was no way for respondent to comply with ICC accounting rules and at the same time obtain an accurate picture of the financial condition of the shop. (R. 444-445, 447, 497, 514; Def. Ex. 22.) Also, some of the members of the Wooten family, which owned respondent in 1966, did not want the railroad to be in the car repair business — they did not want it

*The record indicates that the ICC would not permit a railroad to borrow an amount equal to more than 5% of its capital, and since respondent's capital stock in 1966 amounted to $400,000.00, it could not borrow more than 5% of $400,000.00 — $20,000.00. (R. 493.)

committed to borrow large sums of money, were apprehensive that the railroad's charter was being violated when almost 50% of its income came from shop operations, and did not consider that car repair was really a proper part of railroading. (R. 318, 319, 483). For all of these reasons, respondent, as of January 1, 1967, placed the repair shop into a wholly owned subsidiary, RSP Railway Equipment Corporation — the "Equipment Corporation."*

The status of the Equipment Corporation, as a wholly owned subsidiary of respondent, lasted for about two years. Early in 1969, the Wooten family sold the railroad, and, on March 26, 1969, the new owners caused the railroad to declare a dividend of its Equipment Corporation stock to the holding company, RSP Holding Company, which had acquired the railroad. The result is that, since March 26, 1969, respondent has not owned any stock of the Equipment Corporation at all. The two are subsidiaries of the holding company; they have no common officers or directors, and none of the officers or personnel of respondent has anything to do with the management or operation of the Equipment Corporation. (R. 362-365, 517-520.)

Turning now to petitioner's claim that he sustained injury while "employed" by respondent, it is undisputed that petitioner, a laborer, has never worked for respondent; that he was first

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*At the time of this spin-off, respondent gave notice of termination of employment to substantially all of its employees engaged in the shop operation, and instructed such employees to make application for employment with the Equipment Corporation if they desired to enter such employment. About seventy persons, being most but not all the employees filing such applications, were employed by the Equipment Corporation as of January 1, 1967. (R. 40, 399.)

employed by the Equipment Corporation in 1968, worked elsewhere for a brief period in 1970, and was reemployed by the Equipment Corporation in the spring of 1970 (by which time, as we have seen at p. 5 hereof, the Equipment Corporation had ceased to be a subsidiary of respondent); and that he was an employee of the Equipment Corporation on May 14, 1971. (Def. Ex. 1, 3; R.138-139, 214, 504.) On that date, there occurred the accident which has given rise to the present suit: it is undisputed that said accident resulted when, in the course and scope of petitioner's employment, he slipped and fell while washing a railroad car owned by J. M. Huber Corporation of Borger, Texas, a customer of the Equipment Corporation. (Pl. Ex. 11; R. 138-140.) Petitioner does not contend that there is any connection between J. M. Huber Corporation and respondent.

At the trial, elements of petitioner's theory for being considered an employee of respondent were submitted to the jury, at petitioner's instance, by two special interrogatories, which inquired (Question No. 1) whether the Equipment Corporation was an "alter ego" of respondent and (Question No. 2) whether the Equipment Corporation was created to enable respondent to escape liability under the FELA. As can be seen in the Appendix to this brief (p. 15 hereof), where the interrogatories and answers are copied in full, Question No. 1 was answered by the jury in favor of petitioner, but Question No. 2 in favor of respondent.

As petitioner recognized below, the answer to Question No. 2, that the Equipment Corporation was not a device to evade the FELA, is beyond attack by petitioner. He says in his petition for certiorari that said jury finding is contrary to "copious" evidence,

but does not even support that statement with a record reference. In fact, the overwhelming weight of the evidence was that the subsidiary corporation was established for the business reasons set out at pp. 4-5 hereof, and not for the purpose of evading the FELA. (R. 334, 454, 482.) Apart from that, however, petitioner did not move for an instructed verdict or object to the submission of Question No. 2, and, so, was precluded from challenging the answer on appeal,* and did not challenge it in the Fifth Circuit.

Petitioner, therefore, was relegated in the Fifth Circuit, and is relegated here, to the jury finding, in answer to Question No. 1, that the Equipment Corporation is an "alter ego" of respondent, which finding was set aside by the district court. The petition for certiorari (p. 8) would have this Court hold that there is an "evidentiary basis" for such finding, but, the same as in his claim of "copious" evidence mentioned in the preceding paragraph, petitioner cites no such "evidentiary basis" at all. Both the district court and the Fifth Circuit found none.

In order to justify disregarding a corporate entity on the basis of "alter ego," it must be shown that the allegedly dominant corporation, the railroad here, exercised "undue domination or influence resulting in an infringement upon the rights" of the allegedly subservient corporation.** Carefully analyzing the undisputed evidence, the district court held that, as a matter of law, there was no evidence of any such domination of the Equipment Corporation by respondent and all the evidence was to

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*See *Pennsylvania National Mutual Cas. Ins. Co. v. Nathan, 361 F.2d 18, 20 (5 Cir., 1966)*, and the many cases there cited.

**_Fawcett v. Missouri Pacific Railroad Co., 242 F. Supp. 675, 678 (W.D. La., 1965), affirmed, 347 F.2d 233 (5 Cir., 1965), cert. den., 382 U.S. 907 (1965)._

the contrary. The court noted that both companies followed regular corporate procedure; that neither owned any stock in the other; that the management and operation of the two companies were different; that the Equipment Corporation was not a railroad and did not perform any "transportation functions, switching operations or any other non-delegable duties of a railroad," but was "strictly in the business of repairing and making major alterations on rolling stock of railroads from over the entire country," and that most of its business was with companies other than respondent. (*385 F. Supp. 458-459*, copied at petition for certiorari 33-35.) This analysis by the district court is supported and compelled by undisputed evidence of record. (R. 362-365, 517-519, Def. Ex. 4-12, 24, 26, 56.); it was not challenged in any respect by petitioner in his brief for appellant in the Fifth Circuit. There, as here, petitioner did not point to a single fact of record which would begin to show that respondent exercised any "undue domination" over the Equipment Corporation — either as of the date of petitioner's injury or at any other time.

In addition to this unchallenged review of the evidence, the district court cited numerous authorities in which it had been held, on similar facts, that there was no basis for disregarding a corporate entity. (*385 F. Supp. 459-461*, copied at petition for certiorari 36-45.) In particular, the court meticulously analyzed two cases in which it was held that an employee of a wholly owned railroad subsidiary, seeking FELA coverage, had failed, as a matter of law, to show the requisite dominance of the subsidiary by the railroad. *Fawcett v. Missouri Pacific Railroad Co., 242 F. Supp. 675 (W.D. La., 1965), affirmed, 347 F.2d 233 (5 Cir., 1965), cert. den., 382 U.S. 907 (1965)*, and *Garrett v. Southern Railway Company, 278 F.2d 424 (6 Cir., 1960), cert.*

den., 364 U.S. 833 (1960). The district court found that the facts of those cases were directly in point with the facts of this one, except that the present case is stronger for the railroad in that the Equipment Corporation, at the time of plaintiff's injury, was not even a railroad subsidiary. Petitioner's brief in the Fifth Circuit did not distinguish, or mention, the *Fawcett* case, the *Garrett* case, the district court's analysis of those cases, or any of the other cases relied upon by the district court.*

ARGUMENT

Petitioner's primary argument for granting certiorari is set out at p. 16 of the petition as follows:

> "The writ should be granted to make known to railroads that they may not divide their functions into subsidiaries and deny to those subsidiary employees FELA benefits, if the purpose of such division is to limit railroad liability."

Simply to state this argument is to demonstrate that, under the record here, this is no reason why the writ should be granted: by unchallenged jury finding, the Equipment Corporation was not created for the purpose of limiting railroad liability, and, by the undisputed evidence (p. 8 hereof), it does not perform any railroad functions, and, indeed, is not a subsidiary of the railroad, respondent.

The essential question in this case — whether petitioner's employer, the Equipment Corporation, was an instrumentality

*In addition to the foregoing holdings, the district court's opinion contained yet another separate, independent ground for its judgment that petitioner take nothing from respondent, i.e., that petitioner was estopped to assert his claim for FELA benefits because he had obtained workmen's compensation upon the representations that he was an employee of the Equipment Corporation and had sustained an injury compensable under Texas workmen's compensation laws. *(385 F. Supp. 462-463,* copied at petition for certiorari 52-55.) This independent ground for the district court's judgment was not challenged or mentioned by petitioner in the Fifth Circuit, and is not challenged or mentioned here.

or adjunct of respondent, so that its corporate entity should be disregarded and all its employees deemed to be employees of respondent — has been fully considered and correctly decided by the courts below.

As we have seen at p. 7 hereof, the first essential element of proof of an "alter ego" or instrumentality relationship would be undue dominance of the Equipment Corporation for the benefit of respondent. Having concluded that no evidence of such dominance was shown in this case, but that, on the contrary, the undisputed evidence is that the Equipment Corporation and respondent were separately administered, the courts below were authorized and required to respect the corporate entity of the Equipment Corporation. Other cases, involving parent and subsidiary, have so held in the context of an injured employee of the subsidiary seeking FELA protection. See *Kelley v. Southern Pacific Company, 486 F.2d 1084, 1085 (9 Cir., 1973), remanded on other grounds, ... U.S. ....., 95 S. Ct. 472 (1974)*; Brooks v. Southwestern Transportation Company, 494 F.2d 1271 (6 Cir., 1974); Fawcett v. Missouri Pacific Railroad Company, 242 F. Supp. 675 (W.D. La., 1965), affirmed, 347 F.2d 233 (5 Cir., 1965), cert. den., 382 U.S. 907 (1965); Garrett v. Southern Railway Company, 278*

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*In *Kelley*, the Ninth Circuit held that the plaintiff had failed to show an alter ego relationship between his employer, PMT, and the railroad, respondent, and, in this Court, the employee "abandoned his claim that PMT's status as respondent's wholly owned subsidiary should render respondent liable generally for injuries to PMT employees." See footnote 2 of this Court's opinion. The plaintiff in *Kelley* contended here that he should be considered the railroad's employee because he was doing work which was the contractual and franchise responsibility of the railroad and because he was using the railroad's work area and equipment and was under the supervision and control of railroad personnel. *42 U.S. Law Week 3573 (1974)*. Petitioner has never made any similar contention, and these factors are not present in our case.

F.2d 424 (6 Cir., 1960), cert. den., 364 U.S. 833 (1960); Williams v. Chicago & Eastern Illinois R. Co., 300 N.E.2d 766 (Ill. App., 1973); Turpin v. Chicago, B. & Q.R. Co., 403 S.W.2d 233 (Mo., 1966), cert. den., 384 U.S. 1003 (1967). As pointed out by the district court, without challenge from petitioner, our case is stronger even than these, because the Equipment Corporation, at the material time,* was not a subsidiary of respondent, and the two had no common officers, directors, or employees. As recognized by the courts below, this failure of petitioner to present any evidence of the necessary dominance is, in and of itself, fatal to his claim that he should be regarded as an employee of respondent.

Even if petitioner had produced any evidence of undue dominance, however, the courts below still would have been required to render a take nothing judgment against him. In order to justify disregarding a corporate entity on common law grounds of "alter ego," it is not enough merely to show undue dominance, it also must be established that the dominance was used to perpetrate some kind of fraud or wrongdoing. *Krivo Industrial Supply Company v. National Distillers & Chemical Corporation, 483 F.2d 1098, 1103, 490 F.2d 916 (5 Cir., 1974); Berger v. Columbia Broadcasting System, Inc., 453 F.2d 991, 995 (5 Cir., 1972), cert. den., 409 U.S. 848 (1972); Steven v. Roscoe Turner Aeronautical Corporation, 324 F.2d 157, 160 (7 Cir., 1963).* This element of petitioner's case was found against him by the jury; the only fraud

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*It is undisputed that, in determining whether one corporation is the alter ego of another, the material time is the time of the transaction complained of — i.e., in this case, the date of petitioner's injury. *Berger v. Columbia Broadcasting System, Inc., 453 F.2d 991 (5 Cir., 1972), cert. den., 409 U.S. 848 (1972).* As of that date, May 14, 1971, it was more than two years since the Equipment Corporation had been a subsidiary of respondent.

or wrongdoing even suggested by petitioner was his contention that the Equipment Corporation was created by respondent to evade the FELA, and the jury found, in answer to Question No. 2, that exemption from FELA liability "was not one of the purposes of the creation" of the Equipment Corporation — which finding is fully supported by the evidence and beyond challenge on appeal by petitioner.

The only other reason assigned by petitioner for granting the writ is set out in the petition for certiorari (p. 14) as follows:

> "The writ of certiorari is necessary in this case to prohibit trial courts from admitting collateral benefits in FELA cases. Additionally, circuit courts should discourage such practice rather than holding that since the trial court has concluded petitioner was not covered by FELA, the evidence admitted was harmless."

Petitioner's reference is to the Fifth Circuit's not sustaining his assignment of error directed to the admission of his workmen's compensation claim in evidence — an alleged error which, he urged to the Fifth Circuit, was prejudicial on "the damage issue." (Petitioner's brief for appellant in Fifth Circuit 21.)* Petitioner's argument here, quoted above, seems to be that the Fifth Circuit, even after correctly concluding that petitioner was not a railroad employee as a matter of law, nevertheless should have reversed on an immaterial evidence ruling in order to "discourage" such rulings in the future. The federal appellate courts, however, on appeal and certiorari, are duty bound to render judgment without regard to alleged errors which could not have affected the outcome of the case, *28 U.S.C. §2111; Allen v. Pearson, 415 F.2d 499, 502 (5 Cir., 1969); Smith v. Travelers Insurance Company, 438*

*Petitioner's position in the Fifth Circuit was that he was entitled to judgment on liability and a new trial on damages.

F.2d 373, 375 (6 Cir., 1971), cert. den., 404 U.S. 832 (1971); the Fifth Circuit properly held that petitioner had "not presented any valid basis for reversal." *503 F.2d 1058,* copied on p. 2 hereof.*

CONCLUSION

Petitioner having failed to prove his theory for being considered a railroad employee, the judgments below, that he take nothing from respondent under the FELA, were right. Petitioner has shown nothing, and there is nothing, which would merit review of those judgments by this Court.

Respectfully submitted,

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*This, however, is not to say that, under the circumstances here presented, it was even error to receive evidence of petitioner's claim for workmen's compensation. Such evidence has been considered by the courts in determining whether the plaintiff should be regarded as a railroad employee, see e.g., *Edwards v. Pacific Fruit Express Company, 390 U.S. 538, 543 (1968); Valentine v. South Coast Corporation, 218 F. Supp. 148 (E.D. La., 1963), affirmed, 334 F.2d 244 (5 Cir., 1964),* and in this case was admitted on the defense of estoppel, an independent ground for the judgment which has never been challenged by petitioner. (See p. 9 hereof.)

PROOF OF SERVICE

I, JACK PEW, JR., one of the counsel for respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 4th day of March, 1975, I served a copy of the foregoing Respondent's Brief in Opposition by mailing three copies in a duly addressed envelope, with first class postage prepaid, to Mr. Aubrey L. Roberts, Jr., P. O. Box 638, Sweetwater, Texas 79556, counsel for petitioner.

JACK PEW, JR.

APPENDIX

Copied below are the special interrogatories submitting petitioner's theory of recovery, together with the jury's answers thereto:

QUESTION NO. 1:

Do you find from a preponderance of the evidence that the RSP Railway Equipment Corporation was an alter ego of the defendant, Roscoe, Snyder and Pacific Railway Company on May 14, 1971?

ANSWER:

(X) It was an alter ego.

( ) It was not an alter ego.

In connection with this question, you are instructed as follows:

"Alter ego" is a Latin term which, as used in the context of this case, means "a second self". If you find from a preponderance of the evidence that at the time of the occurrence in question in this case the defendant Railway Company exercised undue domination or influence over the Equipment Company for the benefit of the Railway Company to the extent that there was an infringement of the rights of the Equipment Corporation and that the Equipment Corporation was therefore merely an adjunct of said Railway Company, then the Equipment Corporation was the alter ego of the Railway Company. Ordinarily, a corporation is a legal entity separate and apart from its stockholders, and the mere ownership of all the stock of one corporation by another, and the identities of the officers or directors of one with the other, are not, standing alone, sufficient to create the identity of corporate interests necessary to justify a finding that one of them is a mere adjunct, or second self, of the other without separate identity. However, the matters of identity of stock ownership and of officers and directors are circumstances which may be properly considered in determining the alter ego question.

QUESTION NO. 2:

Do you find from a preponderance of the evidence that one of the purposes of the defendant, Roscoe, Snyder and Pacific Railway Company, in the creation of the RSP Railway Equipment Corporation was to enable such defendant to exempt itself from liability for damages for personal injuries to its employees under the provisions of the Federal Employers' Liability Act?

ANSWER:

( ) The exemption from such liability was one of the purposes of the creation of RSP Railway Equipment Corp.

(X) The exemption from such liability was not one of the purposes of the creation of RSP Railway Equipment Corp." (R. 633-634.)